Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No. EB-08-TC-3619
	)	
CrossConnection Inc.	)	NAL/Acct. No. 200932170332
	)	
Apparent Liability for Forfeiture	)	FRN No. 0016244733
	)	

PUBLIC [REDACTED] VERSION

Response of CrossConnection Inc.
To
Notice of Apparent Liability for Forfeiture

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SUMMARY

CrossConnection Inc. ("CrossConnection" or the "Company"), by undersigned counsel, hereby responds to the Notice of Apparent Liability for forfeiture ("Omnibus NAL") released by the Chief, Federal Communications Commission, Enforcement Bureau, on February 24, 2009. The Omnibus NAL incorporates the above–captioned EB File Number. Through the Omnibus NAL, the Enforcement Bureau lumps CrossConnection in with more than 600 other entities, each of which is accused of failure to comply, in varying degrees of breach, with the dictates of FCC Rule Section 64.2009(e). Each of the 666 entities listed in Appendix I of Omnibus NAL, including CrossConnection, is tentatively fined a forfeiture in the amount of $20,000 for these supposed breaches. As demonstrated by CrossConnection herein, use of this "omnibus" vehicle to potentially expose more than 600 separate companies to an identical forfeiture, when neither the circumstances applicable to each -- nor the defenses available to each -- could possibly be identical, demonstrates a serious disregard by the Enforcement Bureau of Commission policy and precedent. Use of an "omnibus" NAL in the present circumstances also deprives each of the Appendix I companies of the full measure of due process which the Agency must provide. This deprivation of rights is particularly egregious with respect to any of the 666 Appendix I companies which, like CrossConnection, are not subject to the §64.2009(e) filing obligation.

Inasmuch as every entity listed on Appendix 1 to the Omnibus NAL has been purportedly contacted by the Enforcement Bureau pursuant to a separate EB File Number, CrossConnection is not privy to the facts and circumstances involved in the remaining 665 cases. With respect to its own situation, however, CrossConnection respectfully submits that the totality of the circumstances, which the Bureau is bound by rule and precedent to consider, militate against the imposition of a forfeiture against the Company in any amount. Indeed, in light of the inapplicability of the §64.2009(e) filing obligation to CrossConnection, cancellation in full of the proposed forfeiture is

mandatory. Accordingly, CrossConnection hereby respectfully requests that the tentative forfeiture against it pursuant to EB File No. 08-TC-3619 be cancelled in its entirety.

As demonstrated below, CrossConnection has filed the annual CPNI officer's certification required of certain companies by Rule Section 64.2009(e) for both calendar year 2007(the focus of the Omnibus NAL) and calendar year 2008. It has done so on a continually voluntary basis for the precise purpose of preventing any detrimental action – such as imposition of a forfeiture – by the Enforcement Bureau. Additionally, the Company has also fully cooperated with the Enforcement Bureau's inquiry into the relevant circumstances of the 2007 §64.2009(e) filing, explaining more than six months ago the reasons why §64.2009(e) does not apply to CrossConnection. Furthermore, throughout calendar years 2007 and 2008 the Company experienced zero attempts by data brokers to access customer CPNI. Likewise, the Company has received zero customer complaints regarding improper use or disclosure of CPNI. Thus, even if CrossConnection were within the class of entities required to file a §64.2009(e) annual officer's CPNI Certification (which, as demonstrated herein, it is not), CrossConnection has caused no harm to the FCC's CPNI policies; nor has the Company damaged any individual through misuse or inadvertent disclosure of CPNI, irrespective of whether an annual officer's certification reached the FCC before or after March 1, 2008. In light of the above, the Enforcement Bureau must cancel the proposed forfeiture against CrossConnection in its entirety, or at the very minimum reduce the forfeiture to a mere admonishment.

For all the above reasons, CrossConnection respectfully requests that the Enforcement Bureau dismiss the NAL in its entirety as to CrossConnection, terminate proceeding File No. EB-08-TC-3619 and cancel the $20,000 proposed forfeiture against CrossConnection.

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To
Notice of Apparent Liability for Forfeiture

I. INTRODUCTION.

CrossConnection Inc. ("CrossConnection" or the "Company"), by undersigned counsel, hereby responds to the Omnibus Notice of Apparent Liability ("Omnibus NAL") for Forfeiture released by the Chief, Federal Communications Commission, Enforcement Bureau, incorporating in the above–captioned File Number, as well as 665 other discrete matters, on February 24, 2009. In filing this Response to the Omnibus NAL, CrossConnection does not acquiesce to the procedural ability of the Enforcement Bureau to proceed against the Company by means of an "omnibus" NAL which lumps the Company in with more than 600 other entities. Each of the "Appendix I Companies"[1] is of necessity uniquely impacted by its own circumstances, and each is entitled to fair consideration of those circumstances by the Enforcement Bureau both prior to issuance of a notice of apparent liability and prior to the issuance of any ultimate determination as to the appropriateness of a proposed forfeiture -- after each Respondent has availed itself of the opportunity to respond fully to the specific allegations raised in an NAL.[2]

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[1] In the Matter of Annual CPNI Certification Omnibus Notice of Apparent Liability, File No. See Appendix A (Feb. 24, 2009) ("Omnibus NAL"), ¶ 1.

[2] 47 C.F.R. §1.80(f).

Accordingly, CrossConnection will first address the procedural infirmities associated with the Enforcement Bureau's choice of proceeding by means of an "omnibus" NAL. CrossConnection will thereafter respond to the general allegations raised against itself and the 665 other "Appendix I" companies through the Omnibus NAL. As explained more fully herein, the Enforcement Bureau's conclusions that CrossConnection violated any Commission rule are erroneous and must be rescinded; the proposed forfeiture against CrossConnection must be cancelled in its entirety. For the reasons more fully set forth below, CrossConnection respectfully requests that the Enforcement Bureau dismiss the Omnibus NAL as to CrossConnection, terminate proceeding File No. EB-08-TC-3619 and cancel in its entirety the proposed $20,000 forfeiture against CrossConnection.

II. THE "OMNIBUS" NAL IS A PROCEDURALLY INFIRM MEANS OF ASSESSING FORFEITURES FOR FAILURE TO COMPLY WITH FCC RULE SECTION 64.2009(e).

A. An Omnibus NAL does not provide sufficient due process protections For CrossConnection or any of the other 665 entities listed in Omnibus NAL Appendix I

As an official agency of the United States government, the FCC is bound to adhere to fundamental principles of due process. The Enforcement Bureau, acting according to delegated authority as it does here, is likewise constrained. The Supreme Court has held that

> "Due process, unlike some legal rules, is not a technical concept unrelated to time, place and circumstances. Due process is flexible and calls for such procedure protections as the situation demands."[3]

Furthermore,

> "[I]t is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."[4]

The existing procedures of the FCC do not contemplate an omnibus NAL proceeding in which the Enforcement Bureau attempts to justify the *bona fides* of imposing 666 separate forfeitures,

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3 Matthews v. Eldridge, 424 U.S. 319 (1976).

4 United States v. Cacares, 440 U.S. 741, 751 (1979).

based upon 666 separate sets of facts and circumstances, against 666 diverse entities – each of which will have widely varying defenses to the allegations raised. And the Enforcement Bureau's reminder to each of the 666 Appendix I companies to the effect that each "will have the opportunity to submit further evidence and arguments in response to this NAL"[5] does not cure the due process shortcomings caused by its choice to proceed by means of a flawed, albeit expedient, "omnibus" document.

The instant Omnibus NAL takes more than 23 pages to do nothing more than list, at Appendix I, name after name of the entities subject to the Omnibus NAL. The Omnibus NAL itself, however, provides a mere 4 sentences which purportedly advise this 23 pages of companies what each has done to warrant a $20,000 forfeiture:

> "In this Omnibus Notice of Apparent Liability for Forfeiture ('NAL'), we find that the companies listed in Appendix I of this Order ('the Companies'), by failing to submit an annual customer proprietary network information ('CPNI') compliance certificate, have apparently willfully or repeatedly violated section 222 of the Communications Act of 1934, as amended (the 'Act'), section 64.2009(e) of the Commission's rules and the Commission's *Epic CPNI Order*. . . . The companies failed to comply with the annual certification filing requirement and did not file compliance certifications on or before March 1, 2008, for the 2007 calendar year. . . . Each of the Companies failed to submit satisfactory evidence of their timely filing of their annual CPNI certifications. The Bureau has determined that as a result of the Companies' failure to file annual CPNI certifications, the Companies are in apparent violation of section 222 of the Act, section 64.2009(e) of the Commission's rules, and the Commission's *EPIC CPNI Order*."[6]

Indeed, the totality of the Omnibus NAL consists of a mere 17 paragraphs; 7 of these do nothing more than recite standard ordering paragraph language advising the 666 potentially affected companies the date upon which and to whom payment of the $20,000 forfeiture should be made. In the remaining 10 paragraphs, the Enforcement Bureau provides a scant 2 paragraphs of

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5 Omnibus NAL, ¶ 1.

6 Id., ¶¶ 1, 4.

background on the FCC's CPNI proceeding (which has spanned more than 13 years) and a single paragraph entitled "discussion" which imposes the 666 lock-step forfeitures.[7]

CrossConnection respectfully submits that issuance of this single NAL is unlikely to instill in the 666 Appendix I companies a sense that their respective information responses to the Enforcement Bureau were adequately considered by Staff prior to issuance of the Omnibus NAL.[8] Nor does the situation now confronting the Enforcement Bureau – the necessity of analyzing and considering the various facts and circumstances presented by perhaps as many as 666 Responses to NAL – instill confidence that the Enforcement Bureau has manpower resources sufficient to give those NAL Responses anything other than the short-shrift treatment which Appendix I companies have apparently experienced up to this point.

The Enforcement Bureau's choice to proceed by means of an "omnibus" notice of apparent liability is irreconcilable with the FCC's historic commitment to "protect[] the public and ensure[] the availability of reliable, affordable communications" by considering the totality of the circumstances[9] and by assessing the degree of harm which has actually resulted from a perceived rule violation.[10] This omnibus decisional mechanism is also inconsistent with the FCC's enunciated

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[7] The Omnibus NAL makes abundantly clear that the rich and full history of the CPNI proceeding as a whole has been almost completely ignored, as has the Enforcement Bureau's ethical obligation to diligently investigate matters prior to exercising its enforcement authority.

[8] As noted earlier, CrossConnection responded to the Enforcement Bureau's Letter of Inquiry more than six months ago. At that time, the Company believed it was not subject to the §64.2009(e) filing requirement merely because it does not utilize CPNI for marketing purposes. Upon further reflection, however, it became apparent to CrossConnection that throughout the totality of Calendar Year 2007 it had no access to CPNI; as explained, infra., that lack of access to CPNI definitively places CrossConnection clearly outside the universe of entities which were subject to the §64.2009(e) filing obligation on March 1, 2008. Accordingly, is not within the universe of entities subject to a $20,000 forfeiture with respect to §64.2009(e). .

[9] *See, e.g.*, U.S. v. Neely, --- F.Supp. 29----, 2009, WL 258886 (January 29, 2009) ("Flexibility to review the totality of circumstances" [is] "reflected in precedent and retained by the FCC in its forfeiture guidelines.")

[10] In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, CI Docket No. 95-6, FCC 97-218, (*"Forfeiture Policy Statement"*), ¶ 20.

policy expressed in the *Forfeiture Policy Statement* that it will continue to exercise its "discretion to look at the individual facts and circumstances surrounding a particular violation."[11] It is equally inconsistent with the Small Business Regulatory Enforcement Fairness Act's principle (with which the FCC states its forfeiture rules are in accord) that "warnings, rather than forfeitures . . . may be appropriate in cases involving small businesses".[12] It is further inconsistent with the Commission's "general practice to issue warnings with first time violators . . . this type of violator would receive a forfeiture only after it has violated the Act or rules despite prior warning."[13]

This shift away from Commission precedent as embodied in the Forfeiture Guidelines *Report and Order* and toward the issuance of "omnibus NALs" appears to be of very recent origin. The only other example of an attempt to utilize an "omnibus" proceeding to subject multiple unrelated entities to summary liability appears to be Former Chairman Martin's recent *Omnibus NAL Against Various Companies for Apparent Violations of the Commission's DTV Consumer Education Requirements.* Originally scheduled for consideration at the FCC's December 12, 2008 Open Meeting (ultimately cancelled), that omnibus NAL was never considered by the Commission.[14]

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[11] Id, ¶ 6.

[12] Id, ¶ 51. CrossConnection and certainly a number of the other 665 Appendix I companies, satisfies the statutory definition of "small business" ("The SBA has defined a small business for Standard Industrial Classification (SIC) categories for interexchange carriers, toll resellers and prepaid calling card providers of "small if it has 1,500 or fewer employees". In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services, *Report and Order and Further Notice of Proposed Rulemaking*, FCC Rcd. 11275 (2007) (*"IP-Enabled Report and Order"),* ¶¶ 100, 102, 104.)

[13] Id., ¶ 23. Inasmuch as the annual certification filing set forth in §64.2009(e) was only effective for the first time as of the March 1, 2008 filing, every company impacted by the Omnibus NAL falls within the category of entities which, according to continuing Commission practice, should be subject to no more than a warning here.

[14] Indeed, the FCC's historic use of any sort of an "omnibus" proceeding has been sparse, to say the least. To Respondent's knowledge, these few departures from a more individualized consideration of facts have not been utilized by the Agency to accomplish a purpose so broad (or so financially detrimental) as the instant NAL, which seeks to impose a significant financial forfeiture on 666 separate entities. (*See, e.g.*, In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Chariton, Bloomfield, and Mecher, Iowa), MM Docket No. 89-

The Omnibus NAL informs the Appendix I companies that in order to avoid the ripening of the proposed forfeiture into an enforceable debt collectible through government process, "each of the Companies listed in Appendix I" . . . must file "a written statement seeking reduction or cancellation of the proposed forfeiture."[15] Pursuant to FCC Rule §1.80, companies caught up in the Omnibus NAL must take this action within 30 days of the issuance of the Omnibus NAL, *i.e.*, no later than March 26, 2009 (a mere 10 days following the date upon which affected carriers were required to complete the FCC's newly expanded Form 477 filing utilizing, for the first time, the FCC's newly developed on-line filing system, and a mere 5 days prior to the FCC's annual Form 499-A filing).[16] FCC rules also ensure CrossConnection's right to petition for reconsideration of any NAL decision which may be issued following the Enforcement Bureau's consideration of the facts set forth in this Response and, if necessary, to seek further vindication of its rights before the courts.[17] CrossConnection is confident that these further actions will not become necessary.

264, 1992) (omnibus notice of proposed rulemaking); In the Matter of Review of the Technical Assignment Criteria for the AM Broadcast Services, MM Docket No. 87-267 (1990) (omnibus notice of inquiry); In the Matter of Amendments of Part 73 of the Rules to Provide for an Additional FM State Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations, MM docket No. 88-357 (1989) (omnibus notice); In the matter of Amendment of the Commission's rules Regarding the Modification of FM and Television Station Licensee, MM Docket No. 83-1148 (1984) (omnibus notice); and In the Matter of Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments, BC Docket No. 80-90 (1984) (omnibus notice).

[15] Omnibus NAL, ¶ 13.

[16] 47 C.F.R. § 1.80. This timing is most unfortunate, requiring respondent entities to take away much-needed resources from these other administrative functions; it is perhaps unavoidable, however, given that the FCC's NAL rules would have prevented the issuance of an NAL against any entity (even one which might have no defenses available to the allegations) if the Enforcement Bureau had delayed even a few days longer before issuing the Omnibus NAL. *See, e.g.*, 47 U.S.C. §503(b)(6) ("No forfeiture penalty shall be determined or imposed against any person under this subsection if . . . the violation charged occurred more than one year prior to the date of issuance of the . . . notice of apparent liability.")

[17] Furthermore, because the instant Response incorporates a financial hardship claim, it is without question that Staff's review of CrossConnection's Response to the Omnibus NAL must be resolved on an individual basis pursuant to FCC Rule §503(b)(2)(D). Staff may not attempt a wholesale resolution of this matter by means of a similarly flawed "omnibus" Memorandum Opinion and Order. *See Forfeiture Policy Statement*, ¶ 43.

Unfortunately for the Enforcement Bureau, however, the bare existence of continuing rights to press for a legitimate factual and equitable review of circumstances at a later date cannot diminish the negative impact of the Omnibus NAL upon the Appendix I companies, required in the here-and-now to respond to allegations which should never have been raised in the first place:

> "[L]ong-settled principles that rules promulgated by a federal agency, which regulate the rights and interests of others [must be] 'premised on fundamental notions of fair play underlie the concept of due process."[18]

Such fundamental notions of fair play are not present within the context of the Omnibus NAL, for as the United States Court of Appeals for the District of Columbia Circuit has noted, "the mere existence of a safety valve does not cure an irrational rule".[19] The mere possibility that CrossConnection will ultimately be vindicated at some future date cannot offset the impact of the Hobson's Choice confronting it today: the need to expend manpower and financial resources to defend itself against the ill-considered, cookie-cutter allegations set forth in the Omnibus NAL vs. the certainty of financial harm (and FCC "red-lighting") if no defense is mounted.[20]

As the Enforcement Bureau is aware,

> "While agency expertise deserves deference, it deserves deference only when it is exercised; no deference is due when an agency has stopped shy of carefully considering the disputed facts.' Cities of Carlise and Neola, 741 F.2d at 443."[21]

And as more fully explained infra., the Enforcement Bureau clearly made no attempt to follow up on facts which it believed to be in dispute with respect to the issue of whether CrossConnection might indeed have a §64.2009(e) filing obligation. Thus, wholly apart from its

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18 Montilla v. I.N.S., 926 F.2d 162, 166-167 (2nd Cir. 1991).

19 *See* Icore, Inc. v. FCC, 985 F.2d 1075, 1080 (D.C. Cir. 1993); ALLTEL Corp. v. FCC, 838 F.2d 551, 561 (D.C. Cir. 1988).

20 Indeed, CrossConnection is keenly aware – as should be the Enforcement Bureau -- that the harm would be all the more severe in the case of a small entity caught up in Appendix I which is presently without sufficient funds to mount the required defense within the 30-day filing window. The necessity of filing the instant Response is severely impacting CrossConnection's financial situation, yet the pendency of the Omnibus NAL ensures that the Company has no realistic opportunity to do otherwise.

21 Achernar Broadcasting Co. v. FCC, 62 F.3d 1441, 1447 (1995).

unexplained departure from Commission precedent (which would have resulted in nothing more than a warning to CrossConnection and the 665 other entities named in Appendix I) the Enforcement Bureau has failed to satisfactorily perform the type of investigation upon which a proposed forfeiture might withstand due process scrutiny. The due process concerns presented by the Omnibus NAL, however, do not end there.

As the Omnibus NAL notes, "[t]he Bureau sent Letters of Inquiry ('LOIs') to the Companies asking them to provide copies and evidence of their annual CPNI filings."[22] CrossConnection is aware, and the Enforcement Bureau's own records will corroborate, that numerous companies in addition to the 666 listed in Appendix I received such Letters of Inquiry. These individual entity responses to the Enforcement Bureau's Letters of Inquiry are not the subject of any "restricted" proceeding; nor are they subject to any confidentiality restrictions which the parties themselves have not voluntarily imposed.

The FCC's NAL rules presuppose a single-party action (rather than an "omnibus" proceeding");[23] thus, those very rules preclude CrossConnection from participating in any of the 665 other Enforcement Files of the companies listed in the Appendix I. CrossConnection is nonetheless aware, however, through the non-confidential flow of information among industry parties, that certain entities which provided responses to the Enforcement Bureau's Letters of Inquiry have not been named in Appendix I – and therefore are not presently facing forfeiture. This, even though certain of these parties provided explanatory statements to the Enforcement Bureau which were identical in circumstance and defense to those expressed in LOI responses provided by other entities which *are* presently facing a $20,000 forfeiture as a result of the Omnibus NAL.

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22 Omnibus NAL, ¶ 4.

23 *See* FCC Rule §1.80(f), every sub-element of which speaks to an NAL against a single *respondent.*

This is a clear example of the impropriety of proceeding via an "omnibus" NAL. "[T]he Commission's dissimilar treatment of evidently identical cases . . . seems the quintessence of arbitrariness and caprice."[24] And "[i]f the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.[25] Putting the best face on this dissimilarity of treatment of similarly-situated regulated entities, CrossConnection will acknowledge that the sheer magnitude of effort required for the Enforcement Bureau to adequately analyze every response it received to its mammoth LOI undertaking must have been immense. Perhaps, then, no intentional dissimilarity of treatment or result was actually intended by the Enforcement Bureau.

The LOIs went out to companies in September, 2008. Between then and the adoption and release of the Omnibus NAL on February 24, 2009, the Enforcement Bureau had approximately 180 days to receive in the informational responses, sit down and carefully analyze each one, consider the forfeiture policy factors as those factors would apply to each individual respondent's circumstances, and then determine whether a forfeiture would be appropriate. Only after making such a determination would the Enforcement Bureau proceed to assign an appropriate forfeiture amount to each individual circumstance deemed to warrant forfeiture.[26]

As noted above, it is a matter of industry knowledge that certain entities which received an LOI from the Enforcement Bureau have not been named in the Omnibus NAL. It is logical to assume that such entities provided informational responses to their respective LOIs, and that following review the Enforcement Bureau determined forfeiture not to be appropriate. Potentially then, the Enforcement Bureau may have been required to undertake this individualized assessment

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24 Colo. Interstate Gas Co. v. FERC, 850 F.2d 769, 774 (D.C. Cir. 1988).

25 NLRB v. Washington Star Co., 7323 F.2d 974, 977 (D.C. Cir. 1984).

26 CrossConnection notes that the uniform imposition of $20,000 on each of the 666 Appendix I companies does not, on its face, appear to be the result of deliberate, individual forfeiture determinations by Staff.

with respect to thousands of LOI responses. Assuming for the sake of argument, however, that the Enforcement Bureau only received LOI responses from those 666 entities listed on Appendix I, and further assuming those informational responses started to come in to the Enforcement Bureau immediately, Staff would have had to resolve at least three LOI responses each calendar day in favor of forfeiture. Limiting analysis to only days in which the FCC was open for business, that number would more closely approach 5-1/2 resolutions in favor of forfeiture every day. And, of course, the Omnibus NAL was not the Enforcement Bureau's only active proceeding during that six-month window, further limiting Staff's availability for review of LOI responses.

As articulated by the Supreme Court, an

> "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[27]

Given the sheer magnitude of the effort necessary to hold 666 separate entities liable of rule violations severe enough to warrant the imposition of a forfeiture, it is a statistical certainty that errors have been made by the Enforcement Bureau in arriving at its Appendix I results. Indeed, the public record itself confirms as much: in at least one case an Appendix I company, fined a potential $20,000 forfeiture for failure to file a §64.2009(e) annual certification[28] was issued *on the very same day* a second NAL imposing an apparent forfeiture of $6,000. In this second NAL, the Chief of the

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[27] Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Supreme Court has further held that the agency decision "must not 'entirely fail[] to consider an important aspect of the problem," such as the circumstances more fully described in Section II.B.2 hereof. At present, neither the Enforcement Bureau nor the Commission as a whole has considered the unique difficulties facing services providers such as CrossConnection or other companies which as a result of their particular service models oftentimes have no access to CPNI; and neither have as yet officially recognized that any efforts to file a §64.2009(e) annual certification under those circumstances would represent nothing more than the type of "mere nullity" which runs contrary to law and FCC precedent.

[28] Omnibus NAL, Appendix I, ("One Touch India, EB-08-TC-4014).

Enforcement Bureau admits, "[o]n January 3, 2008, [the company] filed its annual CPNI certificate with the Commission."[29]

Through the instant Response to the Omnibus NAL, CrossConnection avails itself of the "opportunity to submit further evidence and arguments."[30] This supplemental information, added to the information already provided in response to the LOI in September, 2008, makes clear that imposition of a proposed forfeiture against CrossConnection was inappropriate to begin with and must now be cancelled. Although an Enforcement Bureau decision canceling the proposed forfeiture would not eliminate the procedural infirmities and due process concerns raised by the Omnibus NAL, it would at least relieve Respondent from the specter of financial harm – harm which, as demonstrated in Section IV hereof, would severely impact the Company's finances. Indeed, no logical correlation exists between the financial harm the Enforcement Bureau seeks to visit upon CrossConnection and any harm caused to the FCC's CPNI policies and consumer protection goals. In the instant case, such harm to CPNI policies and consumer protection goals is not merely negligible, it is nonexistent.

B. The Generic Conclusions Set Forth In the Omnibus NAL Are Impermissibly Broad and Inconsistent with the Underlying Purposes of Section 222 and the Commission's CPNI Rules

1. The Enforcement Bureau Erred by Failing to Consider the Congressional Intent Underlying Section 222 and the History Of the FCC's CPNI Rules

All 666 Appendix I companies are damaged by the Omnibus NAL's cursory allegations because the Enforcement Bureau clearly has failed to consider the Congressional intent underlying Section 222 as a whole. Bearing these underlying purposes in mind is essential to reasoned decisionmaking here. Failure of the Enforcement Bureau to have done so renders the Omnibus

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[29] In the Matter of One Touch India LLC Apparent Liability for Forfeiture, File No. EB-09-TC-137, (Feb. 24, 2009), ¶ 4.

[30] Omnibus NAL, ¶ 1.

NAL the precise form of "frenzied rhetorical excess" which "in light of the actual facts, appears to be so lacking in merit" and which "cannot but [be] view[ed] with considerable suspicion."[31]

The FCC's CPNI proceeding was opened in 1996 "to implement section 222 of the Act, which governs *carriers' use and disclosure of CPNI.*"[32] Prior to that time, however, CPNI-like regulations did exist and were applicable to only a small universe of entities -- those deemed most capable of the anticompetitive use of highly sensitive information to disadvantage competitors. Specifically, in its Computer II, Computer III, GTE ONA and BOC CPE Relief proceedings, "[t]he Commission . . . adopted . . . CPNI requirements . . . to protect independent enhanced service providers and CPE suppliers from discrimination by AT&T, the BOCS and GTE."[33] Even these early CPNI-like regulations made a clear distinction between information which was deemed to pose no competitive threat (and, accordingly, the use of which was not restricted) -- aggregate data consisting of "anonymous, non-customer specific information."[34] The FCC was particularly

> "cognizant of the dangers . . . that incumbent LECs could use CPNI anticompetitively, for example, to: (1) use calling patterns to target potential long distance customers; (2) cross-sell to customers purchasing services necessary to use competitors' offerings (e.g., attempt to sell voice mail service when a customer requests from the LEC the necessary underlying service, call forwarding-variable); (3) market to customers who call particular telephone numbers (e.g., prepare a list of customers who call the cable company to order pay-per-view movies for use in marketing the LEC's own OVS or cable service); and (4) identify potential customers for new services based on the volume of services already used (e.g., market its on-line service to all residential customers with a second line."[35]

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31 See WCWN Listeners Guild v. FCC, 610 F.2 838, 849 (1979).

32 *Third Report and Order*, ¶ 5. Thus, from the very inception of Section 222, an entity such as CrossConnection, which had no access to CPNI – and which by necessary implication could neither use nor disclose CPNI, has not constituted the type of entity with which the CPNI rules is concerned.

33 In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, *Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061 (1998) ("*Second Report and Order*"), ¶ 7.

34 Id., ftnt. 531.

35 Id., ¶59.

With the Telecommunications Act of 1996, "Congress . . . enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition."[36] While a "fundamental objective" of Section 222 was "to protect from anti-competitive conduct carriers who, in order to provide telecommunications services to their own customers, have no choice but to reveal proprietary information to a competitor,"[37] the FCC also made explicitly clear a central concept from which it has never waivered: CPNI must be protected because it "consists of highly personal information.[38] Indeed, the FCC has confirmed that the presence of such individually identifiable information is the essential characteristic of CPNI:

> "Aggregate customer information is defined separately from CPNI in section 222, and involves collective data 'from which individual customer identities have been removed.'. . . aggregate customer information does not involve personally identifiable information, as contrasted with CPNI."[39]

In 1998, the FCC identified

> "[t]hree categories of customer information to which different privacy protections and carrier obligations apply – individually identifiable CPNI, aggregate customer information, and subscriber list information. . . . Aggregate customer and subscriber

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[36] Id., ¶ 1. Even within the context of the earlier Computer II, Computer III, GTE ONA and BOC CPE proceedings, however, "CPNI requirements were in the public interest because they were intended to protect legitimate customer expectations of confidentiality regarding individually identifiable information." In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carrier's Use of Customer Proprietary Network Information, Notice of Proposed Rulemaking *("CPNI NPRM")*, ¶ 12.

[37] In the Matter of Brighthouse Networks, LLC, et al, Complainants v. Verizon California, Inc., et. al, Defendants, *Memorandum Opinion and Order,*. 23 FCC Rcd. 10704 (1998), ¶ 22. *See also,* In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Proprietary Network Information and other Customer Information; Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended, 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers; *Third Report and Order and Third Further Notice of Proposed Rulemaking,* 17 FCC Rcd. 14860 (2002) (*"Third Report and Order"*), ¶ 131("We reaffirm our existing rule that a carrier executing a change for another carrier 'is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.'")

[38] Id., ¶ 61.

[39] Id., ¶ 143.

> list information, unlike individually identifiable CPNI, involve customer information that is not private or sensitive . . ."[40]

Furthermore, the FCC has emphasized

> "[t]he CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. . . . Where information is not sensitive, . . . the statute permits the free flow or dissemination of information beyond the existing customer-carrier relationship . . . . [W]here privacy of sensitive information is by definition *not* at stake, Congress expressly *required* carriers to provide such information to third parties on nondiscriminatory terms and conditions."[41]

Yet even as it has admonished carriers that CPNI must be scrupulously protected, the FCC has never required them to take action which would be unnecessary to the Agency's enunciated privacy protection goals. Indeed, the FCC has explicitly informed carriers that they need not comply with aspects of the CPNI rules in situations where such rules would have no logical effect; *i.e.*, where no danger of anticompetitive use of individually identifiable personal information is possible:

> "Moreover, to the extent carriers do not choose to use CPNI for marketing purposes, or do not want to market new service categories, they do not need to comply with our approval or notice requirements."[42]

Unlike the Enforcement Bureau's attempt to impose the §64.2009(e) annual certification requirement upon all companies (regardless of whether any CPNI is possessed or used, and without regard to whether a company is subject to Title II[43]), the FCC's exercise of restraint within the context of the CPNI approval and notice requirements constitutes a valid exercise of administrative authority which is consistent with the dictates of Lynch v. Tilden Produce Co. and its progeny.[44]

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41 Id., ¶ 3.

42 Id., ¶ 236.

43 The only exercise of Title I ancillary jurisdiction noted in the *EPIC CPNI Order* apparently being the inclusion of providers of interconnected VoIP services within scope of 64.2009(e).

44 *See* Section IV, infra.

The FCC has stated that its CPNI rules represent "a careful balancing of harms, benefits, and governmental interests."[45] And a review of the overall history of the CPNI proceeding reveals this to be the case. As Commissioner Robert McDowell has observed, "our rules should strike a careful balance and should also guard against imposing over-reaching and unnecessary requirements that could cause unjustified burdens and costs on carriers."[46] The Omnibus NAL, unfortunately, because it focuses exclusively on a single aspect of a single rule sub-part without considering the fuller history and purposes of the CPNI rules, falls far short of achieving the type of balanced result that the FCC has always sought (and until the Omnibus NAL has achieved) with respect to the application of its CPNI rules.

2. The Enforcement Bureau Erred By Imposing §64.2009(e) Liability Upon Entities Which Have No Access to CPNI

In the Omnibus NAL, the Enforcement Bureau places much emphasis upon Section 222's "general duty on all carriers to protect the confidentiality of their subscribers' proprietary information,"[47] going so far as to characterize "protection of CPNI" as "a fundamental obligation of all telecommunications carriers as provided by section 222 of the Act."[48] CrossConnection does not disagree that the protection of highly personal individual information may indeed be a fundamental obligation of all telecommunications carriers which actually possess such information. The Omnibus NAL altogether fails to consider – prior to imposing blanket liability upon 666 companies – whether those companies even pose a risk of CPNI disclosure (which they do not) and, if not, whether any logical basis can be found for requiring the filing of the 64.2009(e) annual certification (which there is not).

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45 *Third Report and Order*, ¶ 2.

46 *IP-Enabled Report and Order*, Statement of Commissioner Robert M. McDowell, p. 1.

47 Omnibus NAL, ¶ 2.

48 Id., ¶ 1.

Specifically referencing the 2006 actions of "companies known as 'data brokers'"[49] as a result of which in 2007 "the Commission strengthened its privacy rules with the release of the *EPIC CPNI Order,*"[50] the Enforcement Bureau identifies the sole focus of the Omnibus NAL – the single sub-element of §64.2009 which directs companies to file for the first time in March, 2008, an officer's certification "explaining how its operating procedures ensure that it is or is not in compliance with the rules in th[e entire] subpart"[51] of §64.2009. In assessing identical forfeitures upon each of the 666 Appendix I companies[52] the Enforcement Bureau looks no farther than to determine whether an annual certification was filed (although forfeiture has also been imposed, apparently, for failure to file on or before the March 1, 2008 deadline). The inquiry which the Enforcement Bureau has not made – and one which is critical to its determinations – is whether any of these entities actually had an obligation to make that filing. In many cases, such as CrossConnection's, the answer to that question is a clear no:

Section 64.2009(a) deals with the implementation of a system which will establish a customer's CPNI approval *prior to use.*[53] As noted above, the FCC has held that the CPNI rules relating to use of CPNI apply only to carriers which choose to use customer CPNI.[54] Section 64.2009(a) falls into the same category, *i.e.*, applicable only when CPNI will be *used.* Thus, a

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49 Id, ¶ 3.

50 Id.

51 As demonstrated in the following section, this requirement in and of itself is of particular concern to any company which, as a result of its business model, does not have access to CPNI. A number of the FCC's CPNI rules generally have no applicability to such service models and the FCC has never suggested that it expects entities to undertake a regulatory action which would only be a nullity with respect to itself. See Section III, infra.

52 At different points in the Omnibus NAL, the Enforcement Bureau bases such forfeiture upon the alternate, and inconsistent, theories of failure to file and also failure to file timely – certainly both situations cannot apply to a single entity; this is yet another example of why use of an Omnibus NAL was ill-considered.

53 47 C.F.R. §64.2009(a).

54 *See* p. 14, supra.

company like CrossConnection, which did not have access to CPNI in calendar year 2007, §64.2009(a) is a nullity and, as addressed in Section III following, is thus inapplicable to it.

Section 64.2009(b) directs carriers to train their personnel "as to when they are and are not authorized to use CPNI" and further demands the establishment of "an express disciplinary process in place."[55] In the case of a company which does not have access to CPNI, there is need for neither training nor discipline. The reason is simple: without access to CPNI, there will never be a situation where CPNI use will be authorized and there will never be the necessity of disciplinary action since an employee cannot inadvertently reveal information which is not in his or her possession. Nonetheless, owing to the Enforcement Bureau's near-fanatical approach to enforcement of §64.2009(e), the public record in EB Docket No. 06-36 demonstrates that numerous such companies have taken the purely superfluous steps of (i) developed training programs (which can do little more than educate employees concerning the operation and scope of the CPNI rules, since these employees will never come into access of individually identifiable customer CPNI) and (2) instituting a disciplinary process which will never need to be used. Like §64.2009(a), §64.2009(b) is also a nullity with respect to companies which do not have access to CPNI.

Likewise, §64.2009(c) deals with the retention of records of "all instances where CPNI was disclosed or provided to third parties, or where third parties were provided access to CPNI."[56] Inasmuch as one cannot disclose or reveal information which it does not have, §64.2009(c) is also a nullity with respect to companies such as CrossConnection.

Section 64.2009(d) deals with supervisory review of "outbound telemarketing situations."[57] For any carrier which cannot identify individual customers from its internal information (the essence

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55 47 C.F.R. §64.2009(b).
56 47 C.F.R. §64.2009(c).
57 47 C.F.R. §64.2009(d).

of "CPNI"), outbound telemarketing is not a possibility.[58] For example, CrossConnection did not even commence the provision of service until very late in 2007. Even at that time, the Company provided service only on a wholesale basis, serving just a single carrier customer; thus, CrossConnection had no access to CPNI during calendar year 2007. Where outbound telemarketing is not a possibility, §64.2009(d) is a nullity.

And §64.2009(f), the only remaining sub-element other than the annual certification itself, directs carriers to provide written notice to the Commission "of any instance where the opt-out mechanisms do not work properly." Here, again, customers have no need to "opt-out" when they have provided no individually identifiable CPNI to a carrier, and §64.2009(f) is a nullity in such circumstances.

Thus, for any company which by virtue of its particular service model does not have access to CPNI, the totality of §64.2009 has no practical application. And, as explained in Section III, the single filing obligation of the section, embodied in §64.2009(e), is of no effect against such an entity. To the extent any of the 666 Appendix I companies is within this category, whether it is a wholesale provider serving only other carriers, a provider of prepaid services, a provider of services utilizing exclusively LEC billing services, or which for any other reason does not have access to CPNI, the proposed forfeiture of the Omnibus NAL must be cancelled in its entirety.

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[58] Indeed, §64.2009(d) would have no application to any carrier which does not possess CPNI, such as carriers which exclusively utilize LEC billing mechanisms [The FCC has held that BNA is *not* CPNI; *Second Report and Order*, ¶ 97 ("Unlike BNA, which only includes information necessary to the billing process, CPNI includes sensitive and personal information.")], or companies which provide prepaid services which may be utilized by any purchaser or authorized user to utilize the services from any phone; *i.e.*, any telephone number. A prepaid provider would not issue bills to purchasers and thus would not possess any CPNI which would ordinarily be contained in a presubscribed customer's bill. Likewise, such an entity would neither require nor obtain an "address of record"; indeed, a purchaser of such prepaid services need not even supply his or her name at the point of purchase.

III. THE ENFORCEMENT BUREAU IS PRECLUDED AS A MATTER OF LAW FROM IMPOSING LIABILITY UPON CROSSCONNECTION STEMMING FROM SECTION 64.2009(e)

As explained more fully below, CrossConnection was not subject to the March 1, 2008, CPNI certification filing obligation. The Company did not have access to CPNI and thus is outside the scope of entities upon which the bulk of the FCC's CPNI rules have any application. Notwithstanding the inapplicability of the §64.2009(e) filing requirement, however, CrossConnection responded promptly to the Enforcement Bureau's inquiry into whether the Company had satisfied this inapplicable requirement. Furthermore, the Company undertook efforts -- unnecessary, wasteful of resources and of no enhancement to the FCC's policy of protecting highly personal consumer information from misuse or inadvertent release -- to thereafter satisfy the unreasonable expectation of the Enforcement Bureau that even companies not logically – or legally – subject to the filing requirement must nonetheless find some way to file. Thus, as an initial matter, the Omnibus NAL's generic conclusion that CrossConnection "fail[ed] to submit an annual customer proprietary network information ('CPNI') compliance certificate"[59] is clearly erroneous and must be set aside.

It is also patently incorrect, as demonstrated in Section IV, supra., that CrossConnection violated "section 222 of the Communications Act of 1934, as amended (the 'Act')"[60]. On the contrary, CrossConnection's business model ensured to the point of absolute certainty that the Company was incapable of violating the confidentiality precepts embodied in Section 222.

Finally, as to the sole remaining allegation of the Omnibus NAL, it is also clearly false that CrossConnection has violated FCC rules by "not fil[ing] compliance certifications on or before March 1, 2008, for the 2007 calendar year."[61] As demonstrated below, CrossConnection was not

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59 Omnibus NAL, ¶ 1.

60 Id., ¶4.

61 Id.

required to make this filing – either before or after March 1, 2008, and any and all efforts undertaken by CrossConnection to pacify the Enforcement Bureau through filings in EB Docket No. 06-36 have been made on a purely voluntary basis.

Furthermore, prior to receipt of the LOI in September, 2008, there was no logical means by which CrossConnection could have concluded that the Enforcement Bureau expected it to make the March 1, 2008 certification filing. Indeed, the public statements of the Enforcement Bureau up to that date actually led CrossConnection (and apparently a number of the other 665 Appendix I companies) to the opposite conclusion. On January 29, 2008, the Enforcement Bureau released a Public Notice regarding the upcoming first application of §64.2009(e) which required the filing of the Annual Officers Certification and Policy Explanation with the Commission.[62] In that document, the Enforcement Bureau reiterated the purpose of the CPNI certification requirement – to strengthen the Commission's existing privacy rules. Toward that end, the annual certification filing represented an additional "safeguard[] to provide CPNI against unauthorized access and disclosure."[63] The Enforcement Bureau then specifically informed the public that the new requirement is applicable to "all companies subject to the CPNI rules."[64] Thus, the Enforcement Bureau informed the entire telecommunications industry of its position that only companies for whom the CPNI rules have any application – which at a logical minimum would require such companies to have access to CPNI, were expected to make this upcoming filing.[65]

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62 "Public Notice – EB Provides Guidance On Filing of Annual Customer Proprietary Network Information (CPNI) Certifications Under 47 C.F.R. § 64.2009(e)", DA 08-171 (January 29, 2008).

63 Id., p. 1.

64 Id.

65 *See* NARUC v. FCC, 533 F.2d 601 (1976), ftnt 15:

> "The language of the Commission, referring to 'access programming' and 'turn the dial,' shows that the FCC is talking about educational, governmental, public and leased channels changing programming. None of these rules, all video transmissions, is at issue here. The two-way, point-to-point services were not mentioned and their

The Enforcement Bureau even went so far as to provide a "suggested template that filing entities may use to meet the annual certification requirement."[66] Even a cursory review of the Enforcement Bureau's "template" would have been sufficient to demonstrate to any company such as CrossConnection, which had no access to CPNI, that this was a filing requirement which is of no application to it. In fact, any attempt by CrossConnection to file such a certification would represent nothing more than an exercise in wasted effort, the precise form of "practical nullity" which the FCC has always eschewed.[67]

Ultimately, wholly apart from the Enforcement Bureau's statements to the industry which led companies such as CrossConnection to conclude they are not subject to the annual certification filing requirement of §64.2009(e), the Enforcement Bureau is still precluded from applying that annual filing requirement, or imposing a forfeiture, upon CrossConnection here. Application of that filing requirement to a company which has no access to CPNI goes beyond the bounds of "practical nullity"; it is, in fact, an actual nullity:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 265 U.S. 315, 320-322, 44 S.Ct. 488, 68 L. Ed. 1034; Miller v. United States, 294 U.S. 435, 439, 440, 55 S.Ct. 440, 79 L.Ed.

> nature makes it impossible to infer that the FCC language was dealing with them by implication."

Likewise, the Enforcement Bureau's public statements make it impossible to infer by implication that companies which have no access to CPNI were caught up in the annual certification filing; indeed, quite the opposite is true.

66 Id.

67 In the Matter of Southern Pacific Communications Company Revisions to Tariff F.C.C. No. 6, 67 FCC2d 1569, Transmittal No. 113, ¶18: "A tariff must be rejected if it is a 'substantive nullity' such as where the carrier, as a practical matter, cannot provide the service described in the tariff." Similarly, an annual certification filing would be a substantive nullity where, as a practical matter, the company cannot pose a risk to the FCC's consumer privacy protections because the company has no individually identifiable personal information to misuse or inadvertently reveal.

977, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International R. Co. v. Davidson, 251 U.S. 506, 514, 42 S.Ct. 179, 66 L.Ed. 341. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."[68]

The annual certification requirement of §64.2009(e) might indeed be consistent with the Congressional intent of Section 222 generally under some circumstances; furthermore, requiring companies which pose an actual risk to consumer privacy to make this certification may be reasonable. However, requiring entities *which possess no access CPNI* – and therefore (i) could not possibly pose the identified risk of potential misuse or unintentional release of individually identifiable personal information, (ii) could not possibly experience data broker actions; (iii) could not possibly experience customer-initiated CPNI complaints – to file the annual officer's certification coupled with an explanation of how the entity has taken steps to comply with FCC CPNI rules (which only have real, rather than purely theoretical, application to an entity which *does* possess access to CPNI) can by no means be considered either "consistent with the statute" or "reasonable".

IV. CROSSCONNECTION HAS NOT VIOLATED SECTION 222 OF THE ACT, §64.2009(e) OF THE COMMISSION'S RULES OR THE *EPIC CPNI ORDER*

The Omnibus NAL asserts that the 666 Appendix I companies, including CrossConnection, are in apparent violation of (i) Section 222 of the Act; (ii) §64.2009(e) of the Commission's rules, and (3) the Commission's *EPIC CPNI Order.* With respect to CrossConnection, each of these assertions is inaccurate and must be set aside. CrossConnection has violated no provision of Section 222 and it is not subject to the provisions of §64.2009 or those ordering provisions of the *EPIC CPNI Order* implementing the annual certification filing requirement of sub-part §64.2009(e).

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[68] Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134-135, 56 S.Ct. 397, U.S. 1936.

As noted above, the Omnibus NAL, which in the aggregate seeks to impose $13,200,000 in apparent liability for forfeiture, does so without any consideration whatsoever of whether any of the 666 Appendix I companies has done any actual harm to the FCC's CPNI policies in general or to any consumer in particular. Rather, the Omnibus NAL imposes upon each Appendix I company a "knee-jerk", uniform $20,000 forfeiture, ostensibly for failure to file a §64.2009(e) certification.[69] In CrossConnection's case, this allegation is simply untrue. CrossConnection has filed a §64.2009(e) certification for calendar year 2007 – and the record in EB Docket No. 06-36 demonstrates that numerous of the other 665 Appendix I companies have done the same.

After twice asserting the Appendix I companies have "failed to file" the §64.2009(e) certification, the Omnibus NAL asserts as a separate violation that certain of the Appendix I companies "failed to §64.2009(e) certification on or before March 1, 2008."[70] On this point as well, the Omnibus NAL is incorrect; CrossConnection has not violated §64.2009(e) by failing to timely file an annual certification. CrossConnection's §64.2009(e) certification, attached hereto as Exhibit A, was indeed filed on September 19, 2008. However, as noted above, CrossConnection was under no legal obligation to file the certification at any date -- prior to, on, or after -- March 1, 2008. And CrossConnection's EB Docket 06-36 certification filing for Calendar Year 2007 was made on a purely voluntary basis; thus, the date of that filing is entirely irrelevant.[71]

The above allegations are the totality of the charges made against CrossConnection (and the other 665 Appendix I companies); both allegations are false, both must be rescinded and, the proposed forfeiture against CrossConnection must be cancelled in its entirety.

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69 Omnibus NAL, ¶¶ 1, 4.

70 Id., ¶4.

71 In light of the issuance of the Omnibus NAL, out of an abundance of caution, CrossConnection submitted a certification for calendar year 2008 prior to the March, 2009 deadline, although it is not abundantly clear to the Company that it is subject to the filing requirement this year either.

V. APPLICATIONOF THE FACTORS SET FORTH IN THE FCC'S FORFEITURE POLICY STANDARDS MANDATE THE CANCELLATION OF THE OMNIBUS NAL AGAINST CROSSCONNECTION

As demonstrated above, CrossConnection is not liable for forfeiture in any amount because the Company has not violated Section 222 of the Act, §64.2009(e) or the *EPIC CPNI Order.* However, the Company is mindful that any argument not advanced in this Response may be lost to it and therefore, it addresses below the factors from the FCC's *Forfeiture Policy Standards* which the Enforcement Bureau is obligated to take into account: "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[72] By addressing these factors herein, CrossConnection does not concede that any amount would be appropriate as a forfeiture; this analysis is provided only out of an abundance of caution to ensure that the Company's Response to the Omnibus NAL is deemed complete in every respect.

The FCC has stated that "[t]he mitigating factors of Section 503(b)(2)(D) will . . . be used to make adjustments in all appropriate cases."[73] One particular factor, CrossConnection's ability to pay, is addressed in Section VI below. The remainder of the factors, all of which support a downward adjustment of the proposed forfeiture amount, are addressed here.

None of the factors which the FCC considers most significant to retention of a proposed forfeiture in its original amount (or in truly serious situations possibly elevating the amount of a forfeiture) are at issue here.[74] Even in the case of a company which is subject to the §64.2009(e) annual certification filing requirement, the filing itself is a mere ministerial act. Failure to strictly meet a March 1st filing deadline can hardly be considered "egregious misconduct". Furthermore, the

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72 47 U.C.S. §503(b).

73 *Forfeiture Policy Statement*, ¶ 53.

74 *See Forfeiture Policy Statement*, Adjustment Criteria for Section 503 Forfeitures ("Upward Adjustment Criteria: (1) egregious misconduct; (2) ability to pay/relative disincentive; (3) intentional violation; (4) substantial harm; (5) prior violations of any FCC requirements; (6) substantial economic gain; (7) repeated or continuous violation.")

FCC considers whether the amount of any forfeiture, as applied to the specific entity before it, is sufficiently high to act as a "relative disincentive" to repeating rule violations in the future (*i.e.*, a forfeiture should constitute something more than simply a "cost of doing business" for a particularly deep-pocketed rule violator.)[75] As Section VI following makes clear, quite the opposite concern is present here, where CrossConnection will be severely impacted by the proposed forfeiture, perhaps even to the extent of having to close its doors.

As noted above, public statements of the Enforcement Bureau affirmatively led CrossConnection to the conclusion that it was not expected to make a §64.2009(e) filing. Accordingly, the possibility of "intentional violation" of an FCC rule is not present here.[76] And, with respect to the issue of "substantial harm", CrossConnection has clearly demonstrated herein that the Company has caused no harm to the FCC's CPNI policies and no harm to any consumer.

CrossConnection has never received a warning or an admonishment from the FCC. Furthermore, since the filing obligation addressed in the Omnibus NAL arose only for the first time in March, 2008, there is no possibility that CrossConnection is guilty of a prior violation of §64.2009(e). Neither CrossConnection nor any other entity stands to reap a "substantial economic gain" from refusal to timely fulfill a ministerial §64.2009(e) filing obligation; and inasmuch as the Omnibus NAL was issued prior to the second annual §64.2009(e) filing deadline, no entity – including CrossConnection – can be guilty of a repeated violation thereof.

Each of the factors which the FCC considers relevant to a *downward* adjustment of a proposed forfeiture is, however, present here.[77] And each of those factors weigh heavily in favor of a significant reduction in the proposed forfeiture, up to and including reduction of the forfeiture

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75 *See Forfeiture Policy Statement*, ¶19.

76 Indeed, no violation of an FCC rule is present here at all – intentional or otherwise.

77 *See Forfeiture Policy Statement*, Adjustment Criteria for Section 503 Forfeitures ("Downward Adjustment Criteria: (1) minor violation; (2) good faith or voluntary disclosure; (3) history of overall compliance; (4) inability to pay.")

from a monetary fine to a mere warning or admonishment. As noted above, CrossConnection, like many of the other 665 Appendix I companies, ultimately made a §64.2009(e) filing obligation for calendar year 2007; thus, even if the Company had been required to make this filing, doing so only after the March 1, 2008, filing deadline would constitute at most a "minor violation" – a fulfillment of an obligation, albeit tardy, but still a fulfillment. As to "good faith" and "voluntary disclosure", even now the Company believes, consistent with the legal principles addressed above, that the §64.2009(e) filing obligation cannot lawfully be imposed upon it. Thus, the voluntary filing of CrossConnection's calendar year §64.2009(e) filing – as well as the timely filing of a similar certification covering calendar year 2008 – demonstrate a good faith attempt to satisfy the Enforcement Bureau.

CrossConnection's history of overall compliance with FCC rules and regulations is unblemished and, as demonstrated below, the Company is unable to satisfy the proposed forfeiture amount without placing in jeopardy its ability to continue as a going concern. Staff is directed by §503 to also consider "such other matters as justice may require."[78] Thus, the Enforcement Bureau should bear in mind the following as it considers application of the forfeiture factors to CrossConnection's situation. From its very inception, the Company has tried diligently to comply with all FCC rules and regulations. Toward that end, the Company submitted a 499-A registration filing March 2007, just months after its initial corporation formation. CrossConnection took this action in anticipation of initiation service; the actual initiation of service, however, did not occur to any meaningful degree in Calendar Year 2007. Indeed, the Company provided no service whatsoever during almost the entirety of 2007. What little service was provided consisted of service to a single customer, itself a telecommunications service provider. CrossConnection received access to no CPNI from this solitary wholesale customer.

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[78] 47 U.C.S. §503(b).

Furthermore, the Company commenced operations as an extremely small entity and remains so at the present time. Thus, while the Company took such compliance actions which were reasonably available to it, the more esoteric elements of the FCC's complex and sometimes confusing operating procedures may have occasionally escaped it. This is probably most evident with respect to the Company's reliance upon the Enforcement Bureau's advice through Public Notice. Given what appeared to be clear advice that the Company was not expected to make the §64.2009(e) filing, CrossConnection did not delve further into the precise text of Section 222 and §64.2009(e).[79]

Upon receipt of the Enforcement Bureau's Letter of Inquiry, the Company fully and candidly responded with relevant information sufficient, in the Company's opinion, to put the matter to rest. Nevertheless, the Company took the additional further step – on a purely voluntary basis -- of filing a §64.2009(e) certification in order to assure the Enforcement Bureau that there had been no data broker actions and no customer CPNI-related complaints during calendar year 2007.

Pursuant to FCC Rule §1.3, the FCC may waive any rule for good cause shown.[80] Thus, even if CrossConnection were legally subject to §64.2009(e) (which it is not), the interests of justice surely would have supported a waiver of the rule under the above circumstances. Furthermore, the FCC has held that "warnings can be an effective compliance tool in some cases involving minor or first time offenses. The Commission has broad discretion to issue warnings in lieu of forfeitures."[81] Exercise of that discretion, rather than imposition of a forfeiture, would certainly have been the appropriate course of action for the Enforcement Bureau in this case.[82]

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79 Even had the Company done so, however, that text could not reasonably have put the Company on notice that it should make a filing which appeared facially inapplicable to it.

80 47 C.F.R. §1.3.

81 *Forfeiture Policy Statement*, ¶31. *See also* 47 C.F.R. §1.89.

82 Indeed, so strong is the FCC's commitment to this policy of issuing only warnings to first time violators that it has stated its intent to apply the practice "except in egregious cases involving harm to others or safety of life issues." *Forfeiture Policy Statement*, ¶23.

VI. CROSSCONNECTION WILL SUFFER FINANCIAL HARDSHIP UNLESS THE APPARENT FORFEITURE IS CANCELLED IN ITS ENTIRETY

Pursuant to FCC Rule §503(b)(2)(D), Staff must also review on an individual basis CrossConnection's claim of financial hardship. To facilitate that review, CrossConnection (subject to confidential treatment) provides at Exhibit B hereto specific financial documentation[83] which demonstrates that, in light of the Company's financial position, the proposed forfeiture far exceeds the range previously held reasonable by the FCC. Here, a severe reduction is required simply to bring any proposed forfeiture down to the range previously considered reasonable by the FCC.

In fact, mere reduction of the forfeiture amount to a level consistent with FCC precedent would result in a forfeiture so small as to be nonexistent. As CrossConnection's financial documentation makes clear, CrossConnection would suffer an adverse financial consequence were it required to satisfy the proposed forfeiture of $20,000, with the result that the Company might be required to cease operations entirely.

Such a result is simply untenable in light of CrossConnection's efforts to comply with the dictates of a rule section which had no legal application to the Company. Furthermore, the Company went to these extraneous lengths for the sole purpose of staving off action by the Enforcement Bureau prior to the time the Bureau should have completed its review of CrossConnection's LOI response. It is evident that CrossConnection's LOI response was not

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[83] The Commission

> "has the flexibility to consider any documentation, not just audited financial statements, that it considers probative, objective evidence of the violator's ability to pay a forfeiture. The Commission intends to continue its policy of being sensitive to the concerns of small entities who may not have the ability to pay a particular forfeiture amount or the ability to submit the same kind of documentation to corroborate the inability to pay. This is consistent with section 503(b)(2)(D) of the Communications Act and section 1.80(b)(4) of our rules, which provides that the Commission will take into account ability to pay in assessing forfeitures, and with our longstanding case law."

Forfeiture Policy Statement, ¶44.

adequately considered by the Enforcement Bureau; even a cursory consideration of CrossConnection's response should have either resolved the Enforcement Bureau's inquiry or generated a request for additional information – which the Company would gladly have provided. Instead, CrossConnection has been included among the 666 Appendix I companies notwithstanding the legal inapplicability of §64.2009(e) to it.

The draconian financial impact of imposition of the full forfeiture against CrossConnection is further untenable in light of the fact that the annual CPNI certification filing was required of companies actually subject to §64.2009(e) for the very first time in 2008. Thus, if the Enforcement Bureau had not departed from established *Forfeiture Policy Statement* precedent, neither CrossConnection nor any other Appendix I company would have received any sanction stronger than a mere warning.

Finally, the financial detriment of the forfeiture against CrossConnection is untenable because the Company experienced no data broker actions and no customer CPNI complaints during calendar years 2007 or 2008; and CrossConnection has certified as much to the Enforcement Bureau through EB Docket No. 06-36. Accordingly, CrossConnection respectfully requests that the Enforcement Bureau cancel in its entirety the proposed forfeiture against CrossConnection or, at a minimum, convert the proposed forfeiture into a mere admonishment or warning, thereby alleviating any risk of financial harm to the Company.

CONCLUSION

By reason of the foregoing, CrossConnection Inc. hereby respectfully requests that the Enforcement Bureau cancel the proposed $20,000 forfeiture against it, dismiss the Omnibus NAL in its entirety (or reduce it to a mere admonishment against CrossConnection), terminate proceeding File No. EB-08-TC-3619, cancel the proposed $20,000 forfeiture against CrossConnection in its entirety or, at a minimum, severely reduce the forfeiture as set forth above.

Respectfully submitted,

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March 25, 2009

Counsel for CrossConnection Inc.

CERTIFICATE OF SERVICE

I, Suzanne Rafalko, hereby certify that true and correct copies of the foregoing Response of CrossConnection Inc. to Omnibus Notice of Apparent Liability for Forfeiture, were served upon the following, in the manner indicated, this 25th day of March, 2009.

Marlene H. Dortch, Secretary
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Marcy Greene, Deputy Chief
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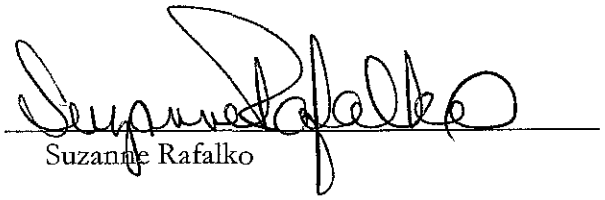
(Reference: NAL/Acct. No. 200932170332)
(via overnight courier and electronic transmission)



Suzanne Rafalko

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No. EB-08-TC-3619
	)	
CrossConnection Inc.	)	NAL/Acct. No. 200932170332
	)	
Apparent Liability for Forfeiture	)	FRN No. 0016244733
	)	

AFFIDAVIT OF NERMIN DIZDAR

State of Washington)
)
County of King)

I, Nermin Dizdar, being duly sworn according to law, depose and say that I am President and Chief Executive Officer of CrossConnection Inc. ("CrossConnection"); that I have personal knowledge of the facts and circumstances in this matter; that the facts set forth in the foregoing Response of to Omnibus Notice of Apparent Liability for Forfeiture ("Response") are true and correct to the best of my knowledge, information and belief; and that the financial documentation set forth in Exhibit B to the NAL Response is correct to the best of my knowledge, information and belief.

Nermin Dizdar

Subscribed and sworn before me this 24th day of March, 2009.

PHARO MARIE CRAIN NOTARY PUBLIC STATE OF WASHINGTON COMM. EXP. NOVEMBER 30, 2011

Notary Public

Exhibit A

CrossConnection Letter of Inquiry Response

The CommLaw Group

HELEIN & MARASHLIAN, LLC
1483 Chain Bridge Road
Suite 301
McLean, Virginia 22101

Telephone: (703) 714-1300
Facsimile: (703) 714-1330
E-mail: mail@CommLawGroup.com
Website: www.CommLawGroup.com

Writer's Direct Dial Number
703-714-1313

Writer's E-mail Address
jsm@commlawgroup.com

February 16, 2009

VIA ECFS TRANSMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 – 12th Street, S.W.
Suite TW-A325
Washington, D.C. 20554

Re: CrossConnection, Inc.
Annual 47 C.F.R. §64.2009(e) Certification
EB Docket No. 06-36

Dear Ms. Dortch:

Pursuant to *Public Notice DA09-9* (January 7, 2009), enclosed herewith for filing with the Federal Communications Commission in the above-referenced docket is the Annual §64.2009(e) CPNI Certification and supporting statement of CrossConnection, Inc.

To the extent you have any questions concerning this filing, please contact the undersigned.

Respectfully submitted,

/s/

Jonathan S. Marashlian
Attorney for CrossConnection, Inc.

CrossConnection, Inc.

STATEMENT OF POLICY REGARDING
CUSTOMER PROPRIETARY NETWORK INFORMATION

In accordance with Section 222 of the Communications Act and the Federal Communications Commission's ("FCC") CPNI Rules (47 C.F.R. Section 64.2001, *et seq.*), CrossConnection, Inc. ("CrossConnection") files this Statement of Policy outlining the Company's procedures for accessing, using and storing Customer Proprietary Network Information ("CPNI").

CrossConnection provides telecommunications services to retail customers. Therefore, because CrossConnection may access, use, or store CPNI when providing these types of services, the Company undertakes the steps outlined in this Statement of Policy to protect CPNI from unauthorized access or misuse.

Definition of CPNI

Under federal law, CPNI is certain customer information obtained by a telecommunications provider during the course of providing telecommunications services (including interconnected VoIP) to a customer. This includes information relating to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier.

Examples of CPNI include information typically available from telephone-related details on a monthly bill such as the types of services purchased by a customer, numbers called, duration of calls, directory assistance charges, and calling patterns. CPNI does not include names, addresses, and telephone numbers, because that information is considered subscriber list information under applicable law.

Use of CPNI

It is the policy of CrossConnection not to use CPNI for any activity other than as permitted by applicable law. Any disclosure of CPNI to other parties (such as affiliates, vendors and agents) occurs only if it is necessary to conduct a legitimate business activity related to the services already provided by CrossConnection to the customer. If CrossConnection is not required by law to disclose CPNI or if the intended use is not otherwise permitted under FCC Rules, the Company will first obtain the customer's consent prior to using or sharing CPNI.

CrossConnection follows industry-standard practices to prevent unauthorized access to CPNI by a person other than the subscriber or Company. However, CrossConnection cannot guarantee that these practices will prevent every unauthorized attempt to access, use, or disclose personally identifiable information.

CPNI Notification

CrossConnection notifies customers immediately of any account changes, including address of record, authentication, online account and password related changes.

Employee Training Policies

All employees of CrossConnection will be trained as to when they are, and are not, authorized to use CPNI.

Specifically, CrossConnection prohibits its personnel from releasing CPNI based upon a customer-initiated telephone call except under the following three (3) circumstances.

1) When the customer has pre-established a password;
2) When the information requested by the customer is to be sent to the customer's address of record; or
3) When CrossConnection calls the customer's telephone number of record and discusses the information with the party initially identified by customer when service was initiated.

Disclosure to Business Customers

CrossConnection may negotiate alternative authentication procedures for services that the Company provides to business customers that have a dedicated account representative and a contract that specifically addresses the protection of CPNI.

Disciplinary Procedures

CrossConnection has informed its employees and agents that it considers compliance with the Communications Act and FCC Rules regarding the use, disclosure, and access to CPNI to be very important.

Violation by company employees or agents of such CPNI requirements will lead to disciplinary action (including remedial training, reprimands, unfavorable performance reviews, probation, and termination), depending upon the circumstances of the violation (including the severity of the violation, whether the violation was a first time or repeat violation, whether appropriate guidance was sought or received from a supervisor, and the extent to which the violation was or was not deliberate or malicious).

Use of CPNI in Sales and Marketing Campaigns

CrossConnection does not use CPNI in any marketing campaigns.

However, if CrossConnection does use CPNI in marketing campaigns, the Company will maintain a record of all sales and marketing campaigns that use the CPNI. The record will include a description of each campaign, the specific CPNI that was used in the campaign, and what products and services were offered as part of the campaign.

CrossConnection will also implement a system to obtain prior approval and informed consent from its customers in accordance with the CPNI Rules. This system will allow for the status of a customer's CPNI approval to be clearly established prior to the use of CPNI.

Prior to commencement of a sales or marketing campaign that utilizes CPNI, CrossConnection will establish the status of a customer's CPNI approval. The following sets forth the procedure that will be followed by the Company:

- Prior to any solicitation for customer approval, CrossConnection will notify customers of their right to restrict the use of, disclosure of, and access to their CPNI.
- CrossConnection will use opt-in approval for any instance in which Company must obtain customer approval prior to using, disclosing or permitting access to CPNI.
- A customer's approval or disapproval remains in effect until the customer revokes or limits such approval or disapproval.
- Records of approvals are maintained for at least one year.
- CrossConnection provides individual notice to customers when soliciting approval to use, disclose or permit access to CPNI.
- The CPNI notices sent by CrossConnection comply with FCC Rule 64.2008(c).

CrossConnection will also establish a supervisory review process regarding compliance with the CPNI rules for outbound marketing situations and will maintain compliance records for at least one (1) year.

FCC Notification

Company is prepared to provide written notice within five (5) business days to the FCC of any instance where the opt-in mechanisms do not work properly or to such a degree that consumers' inability to opt-in is more than an anomaly.

Third Party Use of CPNI

Prior to allowing access to customers' individually identifiable CPNI to joint venturers or independent contractors, , to safeguard CPNI CrossConnection will require all such third parties to enter into a confidentiality agreement that ensure compliance with this Policy Statement and CrossConnection shall also obtain opt-in consent for a customer prior to disclosing the information to such third parties. In addition, CrossConnection requires all outside agents to acknowledge and certify that they may only use CPNI for the purpose for which that information has been provided.

CrossConnection requires express written authorization from the customer prior to dispensing CPNI to new carriers, except as otherwise required by law.

CrossConnection does not market or sell CPNI information to any third party.

Law Enforcement Notification of Unauthorized Disclosure

If an unauthorized disclosure of CPNI occurs, CrossConnection shall provide notification of the breach within seven (7) days to the United States Secret Service ("USSS") and the Federal Bureau of Investigation ("FBI").

CrossConnection shall wait an additional seven (7) days from its government notice prior to notifying the affected customers of the breach.

Notwithstanding the above, CrossConnection shall not wait the additional seven (7) days to notify its customers if the Company determines there is an immediate risk of irreparable harm to the customers.

CrossConnection shall maintain records of discovered breaches for a period of at least two (2) years.

Annual CPNI Certification

Pursuant to FCC regulations, 47 C.F.R. § 64.20089(e), CrossConnection will annually submit to the FCC, prior to March 1st, a CPNI Certification of Compliance and accompanying Statement regarding CrossConnection's Customer Proprietary Network Information (CPNI) policies and operating procedures. These documents certify that CrossConnection complied with federal laws and FCC regulations regarding the protection of CPNI throughout the prior calendar year.

Annual CPNI Certification
47 C.F.R. §64.2009(e)
EB Docket No. 06-36

Name of Company: CrossConnection, Inc.
Form 499 Filer ID: 826837
Name of Signatory: Nermin Dizdar
Title of Signatory: President/ CEO

I, Nermin Dizdar hereby certify that I am an officer of CrossConnection, Inc. ("CrossConnection") and that I am authorized to make this certification on behalf of CrossConnection. I have personal knowledge that CrossConnection has established operating procedures that are adequate to ensure compliance with the Commission's CPNI rules, to the extent that such rules apply to CrossConnection or to any of the information obtained by CrossConnection. *See* 47 C.F.R. §64.2001 *et seq.* Attached to this certification is an accompanying statement explaining CrossConnection's procedures to ensure that it complies with the requirements set forth in §64.2001 *et seq.* of the Commission's rules to the extent that such requirements apply to CrossConnection or to the information obtained by CrossConnection.

CrossConnection has not taken any actions against data brokers before state commissions, state or federal courts, or the FCC in the past year. CrossConnection has not received any customer complaints in the past year concerning the unauthorized release of CPNI. CrossConnection has no information, other than information that has been publicly reported, regarding the processes that pretexters are using to attempt to access CPNI.

Signed: _____

Date: 2/10/2009

Exhibit B

CrossConnection Financial Documentation

[REDACTED – PROVIDED TO THE ENFORCEMENT BUREAU UNDER SEAL IN "CONFIDENTIAL" VERSION ONLY]

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No. EB-08-TC-3619
	)	
CrossConnection Inc.	)	NAL/Acct. No. 200932170332
	)	
Apparent Liability for Forfeiture	)	FRN No. 0016244733
	)	

VERIFICATION

State of Washington)
)
County of King)

I, Nermin Dizdar, being duly sworn according to law, depose and say that I am President and Chief Executive Officer of CrossConnection Inc. ("CrossConnection"); that I am authorized to and do make this Verification for it; that the facts set forth in the foregoing Response of to Omnibus Notice of Apparent Liability for Forfeiture ("Response") are true and correct to the best of my knowledge, information and belief. I further depose and say that the authority to submit the Response has been properly granted.

Nermin Dizdar

Subscribed and sworn before me this 24th day of March, 2009.

PHARO NGETH THAVY
NOTARY PUBLIC
COMM. EXP.
NOVEMBER 30, 2011
STATE OF WASHINGTON

Notary Public